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IN THE

Supreme Court of the United States

October Term, 1960.
No. 728.

GEORGE ZAJICEK, JR., DON R. ZAJICEK, KOOLVENT AWNINGS OF AMERICA, INC., a corporation, KOOLVENT OF CALIFORNIA, INC., a corporation, and KOOLVENT AWNINGS OF LOS ANGELES, INC., a corporation,
Petitioners,

vs.

KOOLVENT METAL AWNING CORPORATION OF AMERICA, a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

The Supreme Court of the United States Has Already Decided the Questions Raised by Petitioner.

(a) The decision of the Circuit Court of Appeals for the Ninth Circuit, from which Petitioner seeks the Writ, follows quite broadly the decision of the Supreme Court of the United States in the case of *Kelly v. Kosuga,* 358 U. S. 516, 3 L. Ed. 2d 475, 79 S. Ct. 429, in which Justice Brennan delivered the opinion of the Court, and in which it is pointed out on Page 519 thereof, that in the prior case of *D. R. Wilder Mfg.*

Co. v. Corn Products Refining Co., 236 U. S. 165, handed down by the Supreme Court, the Court there observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction.

The Court says further on page 520:

> "Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the Courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'"

The Court also says on page 521:

> ". . . it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price. And while analysis in terms of 'divisibility' or from other verbal formula may well be circular, see Corbin, Contracts, Section 1520, in any event where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort herein in question."

See also:

Beloit v. Culligan, 274 F. 2d 29, 34.

In the present case, Plaintiff seeks compensation as provided in the contract for the use by Defendants of Plaintiff's Patents, Trademarks and Good Will, and

in addition, seeks compensation for the continued use by Defendants of said Patents, Trademarks and Good Will after termination of the contract, against the will of the Plaintiff.

Enforcement of the contract and enforcement of the rights of Plaintiff after its termination do not result in enforcing provisions which are in Restraint of Trade.

(b) The judgment of the trial Court was not to the effect that the clause 9(e) was 'automatically' severable. The Amended Complaint [R. 25-26] alleges, as follows:

> "That at the time when the Agreement was entered into between Plaintiff and the said Albert Belshaw, no part of the consideration for the Agreement was paid, or agreed to be paid to Plaintiff, for the covenants contained in Paragraph 9 (e) of said Agreement, and no part of the royalties provided to be paid by the said Albert Belshaw to Plaintiff under the terms of said Agreement, whether by way of minimum royalty or by way of royalty based upon sales by said Albert Belshaw was agreed to be paid to Plaintiff in consideration of the provisions of said Paragraph 9(e) of the Agreement, nor did the same constitute any inducement to the said Albert Belshaw for entering into said Agreement, and said provision 9 (e) was inserted in the Agreement after Plaintiff and said Albert Belshaw had agreed upon the royalty payable to Plaintiff whether by way of minimum royalty or calculated upon sales by said Albert Belshaw, and Plaintiff hereby waives any claim to any benefit to it by virtue of the provisions of Paragraph 9(e)."

This Agreement was assigned to Defendants without any consideration passing to Plaintiff except for Defendants' assumption of its conditions. [Ex. E attached to the Amended Complaint.] (See App. of Appellee's Brief before the Circuit Court.)

While no specific finding on this issue was made, Finding No. 15, and Finding No. 17 [Tr. 104-105], would constitute an implied Finding in support of this issue.

Murray v. Superior Court, 284 P. 2d 1, 6, 44 Cal. 2d 611, 619;

Bacon v. Bacon, 194 P. 2d 697, 704, 32 Cal. 2d 131, 143.

This indicates that there was no finding of "automatic" severability.

(c) With reference to the matter of severability we cite the case of *Oregon v. Winsor*, 20 Wall. (87 U. S.) 64, 70, 20 L. Ed. 464, as follows:

> "Agreements in restraint of trade, whether under seal or not, are divisible and accordingly it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly and one part thereof is void as being in restraint of trade whilst the other is not, the Court will give effect to the latter and will not hold the agreement to be void altogether."

(d) Petitioner contends that the consideration is so integrated as to include clause 9(e) without possibility of severance. In that connection we cite cases on independent covenants, as follows:

Steak House v. Barnett, 65 So. 2d 736, 737, in which the Court says:

> "A covenant is independent where it does not go to the whole consideration of the contract but is only subordinate and incidental to its main purpose."

And again, in *Lincoln Trust v. Nathan*, 74 S. W. 1007, 1010, in which the Court says:

> "Whether a covenant is dependent or independent depends upon the intention of the parties."

We also cite the dissenting opinion in *McGregor v. Westinghouse*, 329 U. S. 402, 415, 91 L. Ed. 380, 67 S. Ct. 421, in which the Court says:

> "Considerations that determine the granting of a license on payment of royalties are distinct from those that underlie an additional clause for price fixing. They are not interdependent in fact and were not so treated by the parties. No artificial notion regarding consideration requires that they be treated as interdependent. On lesser considerations of policy than have guided the course of Patent Law, this Court has refused to treat separate provisions as integrated."

And, in the case of *Pollak v. Brush*, 128 U. S. 446, 455, the Court says:

> "Whether covenants are to be considered dependent or independent is to be considered according to the intention of the parties."

It is respectfully submitted that the trial Court made an implied Finding of Fact that the remainder of the contract was not dependent on clause 9(e).

Illegality of Clause 10(c).

In connection with this clause, we respectfully submit that the finding of the trial Court should not be disturbed.

See Finding No. 17 [Tr. 105], as follows:

> "It is not true that the enforcement of said Agreement would further the unlawful purposes of Plaintiff in violation of the anti-monopoly laws of the United States or the State of California."

It is urged that where this is an issue before the trial Court, the Finding should not be disturbed unless it is contended that it is necessary to determine whether or not this is a question of fact to be determined by the trial Court, or whether from the state of the record, as a matter of law the Finding should be to the contrary.

It is respectfully submitted that the burden being upon the Defendants, the Court found there was not sufficient evidence that the "grant back" provisions under the circumstances shown at the trial constituted restraint of trade or tended to create a monopoly.

Use of Trademark in Antitrust Violation.

The judgment contains in it no elements which would aid or preserve antitrust activities and the Supreme Court case cited by Petitioner is authority only for the fact that "a trade mark cannot be legally used as a device for Sherman Act violation."

In the *Timken Roller Bearing Co. v. United States,* 341 U. S. 503, cited by Petitioner, the Plaintiff was seeking to justify its restraint of trade activities on the ground that it was necessary to establish its trademark. This has no resemblance to the situation in the subject case.

It is respectfully submitted that the Petition be denied.

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Attorneys for Respondent.